Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

No. 79-343

IN THE

Supreme Court of the United States

October Term, 1979

SUN SHIPBUILDING & DRY DOCK COMPANY,

Appellant

v.

COMMONWEALTH OF PENNSYLVANIA, WORKMEN'S COMPENSATION APPEAL BOARD,

JOHN APRIL, CURTIS L. FIELDS, FRANK JANUZCIEWICZ, JOSEPH KIMMEL AND WILLIE MOORE,

Appellees

On Appeal from the Supreme Court of the State of Pennsylvania

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MOTION OF APPELLEES TO DISMISS APPEAL OR TO AFFIRM THE JUDGMENT BELOW

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MOTION OF APPELLEES TO DISMISS APPEAL OR TO AFFIRM THE JUDGMENT BELOW

Appellees move to dismiss this appeal from the judgment of the Commonwealth Court of Pennsylvania, dated March 16, 1979, or alternatively to affirm the decision below.[1] The opinion and order of the Commonwealth Court are reported at 398 A.2d 1111 (1979). The Supreme Court of Pennsylvania denied Appellant's petitions for allowance of appeal to that court on June 4, 1979.

QUESTION PRESENTED

Whether Congress, by its 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), intended to preempt an award of workmen's compensation benefits pursuant to a state statute such as the Pennsylvania Workmen's Compensation Act, with respect to claims falling within the coverage of the LHWCA and state law.

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[1] This appeal may not have been properly taken since "the *validity* of a statute of any state" was not drawn in question in the court below. 28 U.S.C. § 1257(2) (emphasis added).

STATEMENT OF THE CASE

Appellees were injured during the period from 1973 through 1975 in the course of their employment with Appellant Sun Shipbuilding & Dry Dock Company. Each Appellee sustained a facial disfigurement, which is compensable under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 908(c)(20), and under the Pennsylvania Workmen's Compensation Act, Pa. Stat. Ann. tit. 77, § 513(c)(22). While the maximum award for that type of injury under the LHWCA is $3,500, the Pennsylvania Act permits payment of an amount up to $62,425 (275 weeks at $227 per week) in compensation for a serious and permanent disfigurement. Moreover, contested disfigurement claims under the LHWCA may take up to 18 months to process, while a state claim may be adjudicated in 6 to 8 weeks. Therefore, an injured claimant may be substantially advantaged by proceeding under state law in situations involving facial disfigurement.

Each Appellee sought compensation under the Pennsylvania Act. Their claims were sustained by the Pennsylvania Workmen's Compensation Appeal Board, which rejected Appellant's contention "that jurisdiction under the Pennsylvania Workmen's Compensation Act . . . ha[d] been preempted by the 1972 amendments to the Federal Longshoremen's and Harbor Workers Compensation Act. . . ." Jurisdictional Statement, p. A19. The Commonwealth Court of Pennsylvania sustained the Board's jurisdictional ruling, and the Pennsylvania Supreme Court denied Appellant's petitions for allowance of appeal.

ARGUMENT

As appellant acknowledges, this Court's decisions establish that, when faced with a preemption challenge to state legislation, the Court starts "with the asumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), quoted in *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 157-58 (1978). Appellant's contentions fall far short of demonstrating that Congress clearly and manifestly intended to preempt the operation of state workmen's compensation laws in a case such as this.

Appellant makes much of the fact that the 1972 amendments changed the LHWCA from a "gapfiller" to an affirmative exercise of federal jurisdiction. Relatedly, Appellant contends that Congress' determination to accomplish this change partly by broadening the definition of "navigable waters"—a term assertedly associated with exclusive federal admiralty jurisdiction—shows a preemptive intent. We submit, however, that Congress' final abandonment of the "gapfiller" notion only *poses* the question whether the federal statute was intended to preempt state law when coverage overlaps; it does not resolve it. That Congress has elected to make a remedy available for all injuries occurring in certain circumstances is as consistent with an intention to allow injured workers a choice between state and federal remedies when both are applicable as it is with an intention to preempt state remedies. Further, it is immaterial that the change was accomplished in part by broadening the definition of "navigable waters" for purposes of the statute because even prior to the 1972 amendments injuries sustained actually on land, but over "navigable waters" as defined in the Act, were compensable under either state or federal law. See *Calbeck* v. *Travelers Insurance Co.*, 370 U.S. 114, 129 (1962). In any case, it is certainly not clear or manifest that the definitional change was anything more than a simple expedient.[2]

Appellant's reliance on the "exclusivity" language in § 5(a) of the Act, 33 U.S.C. § 905(a), is also misplaced. As

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[2] See also *Askew* v. *American Waterways Operators, Inc.*, 411 U.S. 325, 341 (1973):

> While Congress has extended admiralty jurisdiction beyond the boundaries contemplated by the Framers, it hardly follows from the constitutionality of that extension that we must

Appellant acknowledges, this language was part of the Act prior to the 1972 amendments. Nonetheless, as Appellant concedes, federal law did not preempt all operations of state law during that period. See *Calbeck* v. *Travelers Insurance Co., supra.* Although § 5(a) may preclude recovery under other overlapping *federal* schemes, see *White* v. *Norfolk & Western Ry. Co.,* 217 Va. 823. 232 S.E.2d 807, cert. denied, 434 U.S. 860 (1977); *Poche* v. *Avondale Shipyards, Inc.,* 339 So.2d 1212, 1216 (La. 1976), appeal dismissed for want of jurisdiction sub nom. *Territo* v. *Poche,* 434 U.S. 803 (1977),[3] it does not manifestly preclude recourse to state law any more now than it did before 1972.

Appellant contends, nevertheless, that concurrent jurisdiction is inconsistent with the purpose of the 1972 amendments, as shown by the legislative history. Appellant perceives a congressional intent to ensure adequate and uniform benefits for injured longshoremen. Appellant argues that both objectives can be achieved only if federal jurisdiction is exclusive. Otherwise, a claimant might seek a state remedy less beneficial than the federal one, and benefits will vary depending on what law is applied.

The legislative history on which Appellant relies, however, may best be understood as expressing a concern for *uniformly adequate* coverage. To accomplish that objective, Congress provided a floor that assures injured employees an opportunity for specified benefits regardless of the state in which the injury occurred. Allowing a claimant to pur-

sanctify the federal courts with exclusive jurisdiction to the exclusion of powers traditionally within the competence of the States. . . .

Even though Congress has acted in the admiralty area, state regulation is permissible, absent a clear conflict with the federal law.

[3] The Solicitor General filed an *Amicus* Brief with this Court in *Poche* arguing that the LHWCA does not preempt state law. He contended, *inter alia,* that § 5(a) was not directed at the exclusion of remedies against an employer under other workmens' compensation laws. *Amicus* Brief, pp. 11-12.

sue a state remedy potentially more favorable than the federal remedy is not inconsistent with the congressional objective. And Appellant's concern that a particular claimant might do worse under state law than under federal law is completely conjectural in this case.

It is far from clear that Congress intended its 1972 amendments to the LHWCA to preclude concurrent state jurisdiction.[4] The decisions of the Workmen's Compensation Appeal Board and the Commonwealth Court, on which we rely, adequately establish that proposition. Further, as Appellant acknowledges, other courts that have expressly

[4] Appellant raises an independent challenge to the Commonwealth Court's disposition of the claims of John April and Curtis Fields on the ground that both were injured while repairing ships located in dry docks at Sun Ship's yard. Appellant contends that dry docks have always been considered part of the navigable waters and hence within the area of federal exclusive jurisdiction. Appellant argues that "the Pennsylvania court has concluded that, beyond not intending to preempt state compensation laws for injuries to maritime workers occurring on land in 1972, Congress was also sanctioning an expansion of state jurisdiction over areas previously under exclusive federal jurisdiction as a matter of constitutional law [i.e., by operation of the Admiralty Clause]." Jurisdictional Statement, p. 23. Appellant did not clearly place this claim in issue in the proceedings below. Both the Commonwealth Court and the Appeal Board understood the only claim to be that the 1972 amendments, by operation of the Supremacy Clause, preempted jurisdiction under the Pennsylvania Workmen's Compensation Act where it previously existed. See Jurisdictional Statement, pp. A4, A19, A26. Therefore, this claim is not properly before the Court.

In any event, the claim is without basis. *Calbeck* v. *Travelers Insurance Co.,* 370 U.S. 114 (1962), made clear that an injury to a longshoreman on a dry dock was recompensable under both federal and state law. Federal law could apply because the LHWCA covered injuries on navigable waters, defined as including any dry dock. "At the same time, since the injury did, in a physical sense, occur on land, there is little doubt that a state compensation act could validly have been applied to it." *Id.* at 129.

decided the issue are in accord. *Poche* v. *Avondale Shipyards, Inc., supra; Murray* v. *City of Augusta,* 394 A.2d 1171 (Me. 1978); *Johnson* v. *Texas Employers Insurance Ass'n,* 558 S.W.2d 47 (Tex. Ct. Civ. App. 1977). See also *Newport News Shipbuilding & Dry Dock Co.* v. *Director,* 583 F.2d 1273 (4th Cir. 1978); *Umbehagen* v. *Equitable Equipment Co.,* 329 So.2d 245 (La. Cir. Ct. App. 1976); 4A Larson, The Law of Workmen's Compensation §§ 89.52-53, 89-70 (1979); Gilmore & Black, Law of Admiralty 425-26 (2d ed. 1975). Finally, interpreting the Act to allow recourse to more favorable state remedies is consistent with the Act's remedial nature.

CONCLUSION

The appeal should be dismissed because it does not present a substantial federal question. In the alternative, the decision below should be affirmed.

Respectfully submitted,

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